Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1420

STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, CITIZENS MUTUAL INSURANCE COMPANY, WORCESTER MUTUAL FIRE INSURANCE COMPANY, and THE BEACON MUTUAL INDEMNITY COMPANY,

Petitioners,

v.

ARTHUR ANDERSEN & CO., HERMAN L. MECKLER and EMPIRE NATIONAL BANK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM OF RESPONDENT ARTHUR ANDERSEN & CO. SUGGESTING THAT THE CAUSE IS MOOT

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The respondent Arthur Andersen & Co. ("Andersen") in the above-entitled case files this memorandum to advise the Court of certain facts which in the respondent's view render this cause moot.

The question which petitioners seek to raise in their application is the following: Did the Second Circuit properly exercise its discretion in issuing a Writ of Mandamus which prohibited the District Court from giving a supplementary jury instruction permitting a 5/6 verdict on the pendant state law claims?

On April 26, 1977 the jury in this case returned a verdict with respect to defendants Herman L. Meckler and Empire

National Bank who are respondents in this action. The jury found by a unanimous vote that respondent Meckler was not liable to the plaintiffs and respondent Empire National Bank was liable. (See Appendix, A3)

With respect to respondent Andersen the Court polled the jury to determine how they stood. The jury indicated it was divided 4 to 2 in favor of plaintiffs. (See Appendix, A4) Subsequently, the jury was discharged.

It is therefore apparent that the basic underlying issue of whether a 5/6 jury verdict would have been appropriate is no longer relevant to this case. Not only has the jury been discharged but with respect to respondent Andersen the vote was 4 to 2.

For these reasons Andersen suggests that the issue sought to be raised is moot as to the respondent Andersen as well as the other respondents and that the petition for certiorari should be dismissed on that ground.

Respectfully submitted,

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APPENDIX

STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, et al.

vs.

ARTHUR ANDERSEN & Co., et al.

71 Civ. 4036

April 26, 1977
9:20 a.m.

(At 9:20 a.m. the jury returned to the jury room to continue their deliberations.)

(At 10:40 a.m. a note was received from the jury.)

(Note marked Court Exhibit 55.)

(The note reads:

"Your Honor:

"We have the verdict written out.")

(In open court. Jury absent.)

The Court: Good morning.

Mr. Stichter: Just one small point, your Honor.

I gather that except for accepting the verdict with respect to the other two defendants, all you intend to do vis-a-vis Andersen is to ask them whether in their opinion further deliberations would enable them to reach a unanimous verdict.

The Court: Two questions.

Mr. Stichter: You do not intend to poll them on how their vote stands on Andersen at the moment?

The Court: No, not at all.

Mr. Liebhafsky: If your Honor please, if your Honor after asking the question your Honor intends to ask receives an answer to the effect or which satisfies your Honor that there's no reasonable warrant or justification for sending them back for further deliberations for una-

nimity and, therefore, your Honor reaches a judgment to discharge the jury, I would ask that if your Honor has once made that determination, that then your Honor poll the jury as to how they stand on Andersen's liability.

Mr. Stichter: Obviously—

Mr. Liebhafsky: I don't think your Honor is precluded by the mandamus order from doing that.

Mr. Stichter: Obviously I would object to any kind of a poll.

You may recall in your Honor's own charge way back the first day before the deliberations you told them that they should not indicate how their vote stands at any time. I think the same thing holds true now.

Obviously what plaintiffs are trying to do is to take advantage if they could of a five to one verdict in the event that the Supreme Court of the United States finally decides to reverse itself.

The Court: Not reverse itself.

Mr. Stichter: To reverse the Court of Appeals, let me put it that way. I would certainly object to such a procedure.

Mr. Liebhafsky: Your Honor, I think—

The Court: Under these peculiar circumstances, Mr. Stichter, your objection is noted on the record.

Under these peculiar circumstances I would grant Mr. Liebhafsky's request after we have gotten the whole verdict.

All right, let's get the jury in.

(Jury present.)

The Court: Good morning, ladies and gentlemen.

By the Court:

Q. Now, I'm going to ask you a couple of questions with respect to your apparent and disclosed disagreement with respect to the claim against Arthur Andersen and I will ask each of you two questions.

Number one, are you in disagreement with respect to that claim and, number two, is it your opinion that further deliberations with respect to that claim would not result in a verdict?

Juror No. 1, will you tell me what your answers would be to those two questions.

A. Could you repeat the first question, your Honor?

Q. The question is:

Are you now in disagreement with respect to that claim? A. Yes.

Q. Against Arthur Andersen? A. Yes.

Q. In your opinion, would further deliberations result in a verdict in that? A. My opinion is that it would not.

Q. All right. Juror No. 2? A. I say the same.

Q. Juror No. 3? A. The same.

Q. Juror No. 4? A. The same.

Q. Juror No. 5? A. The same opinion.

Q. Juror No. 6? A. The same.

Q. Have you reached a verdict with respect to the other defendants? A. (The Forelady) Yes, we have.

Q. You have written it out? A. Yes.

Q. Will you tell us what that verdict is? A. We find for plaintiffs against Empire in the amount of $2,700,000 and with pre-judgment interest from September 1, 1970 and in favor of Meckler against plaintiffs. Verdict for Meckler on Empire's cross claim and we are deadlocked on Andersen.

Q. And that is your verdict? A. That is our verdict.

Q. Juror No. 2, is that your verdict? A. Yes.

Q. Juror No. 3? A. Yes, your Honor.

Q. Juror No. 4? A. Yes.

Q. Juror No. 5? A. That's my verdict, your Honor.

Q. Juror No. 6? A. Yes.

Q. All right.

Now, I will ask you also with respect to Andersen, although I have indicated to you earlier on that I would not

ask you this question and that you should not disclose it, I will ask each juror whether they were in favor of a verdict against Andersen or not.

Juror No. 1? A. I was in favor of a verdict against Andersen.

Q. Juror No. 2? A. No.

Q. Juror No. 3? A. Against.

Q. Juror No. 4? A. Against.

Q. Juror No. 5? A. I was in favor of a verdict for Andersen.

Q. Juror No. 6? A. Against.

Q. I didn't quite understand Juror No. 2's answer.

You were in favor of a verdict against Andersen or for Andersen? A. I was for Andersen.

The Court: All right. Fine.

Now, ladies and gentlemen, you have had a long time listening to the evidence in this case and you have had a long time deliberating in the case.

I would be remiss in my duty if I didn't say that I was proud of your performance throughout the whole seven months that you have been here. I recognize that it was a matter of personal sacrifice for many of you. I'm sure that counsel for both sides, whether they be winners or losers, would express the same opinion.

Gentlemen, if you have anything to say, I will give you an opportunity at this time.

Mr. Liebhafsky: On behalf of the plaintiffs, we would join your Honor in thanking the jury for their remarkable service.

Mr. Marshall: On behalf of Mr. Meckler, I, too, thank you all.

Mr. Stichter: We, too, thank you for your tremendous devotion to your duty.

Mr. Alcorn: Also Empire National Bank would thank the jury for their long endurance even though the verdict is against us. Congratulations on doing your duty.

Mr. Goldman: I would go beyond saying you have done your duty and thank you for the tremendous efforts you have made to resolve these claims. I really think after seven months you have gone beyond the call of duty.

Mr. Meyerson: Thank you very much, all of you. It's been a long time and now if we see each other on the subways, I would like to say hello.

The Court: I would say this to you:

You need not discuss this matter with anyone, but that is a matter of personal choice on your part, but you need not do so.

All right. With that you are discharged with the thanks of the Court.

(Jury excused.)

Mr. Stichter: Your Honor, we will be filing a formal motion which I think is really a matter of form at this point. But in accordance with Rule 50B of the Federal Rules of Civil Procedure, they not having reached a verdict as to Andersen, we would ask for a judgment in accordance with our motion for a directed verdict which we made both at the end of the plaintiffs' case and at the end of the entire evidence.

Mr. Alcorn: Your Honor, Empire National Bank will also be filing formal motions.

For the purpose of the record, however, I would say that Empire National Bank moves for a judgment in its favor, notwithstanding the verdict. We move to have the judgment entered in accordance with Empire National Bank's motion for a directed verdict. If your Honor denies that, we would ask for a new trial and make a formal motion along that line.

We would also move for a stay of the entry of a judgment due to the fact that all of the claims have not been adjudicated.

Mr. Goldman: Although we will be filing formal motion papers, I would like to make one oral motion for a judg-

ment dismissing the third party claim against Aristocrat Angus on the basis of point 4 of your charge which appears at pages 13,991 and 992 of the record in which you said:

"In the event that Andersen is not one of the defendants against whom you found a verdict, then Andersen's third party complaint against Empire, Meckler, Bonura, Aristocrat and the Dick Estate must fail and your verdict must be verdict for third party defendants, et cetera."

On that basis I would ask that you enter judgment dismissing the claim against the third party defendants. In the event that you decline to do so at this time, we will move on formal papers within the ten-day limit.

Mr. Stichter: I noticed that this morning when I was reviewing the form of jury verdict, and obviously that charge was predicated on the assumption that they would return a verdict as to Andersen, not having reached a verdict, that just simply doesn't apply.

The Court: Yes. I think it certainly contains the assumption that a verdict would be returned in favor of Andersen rather than against Andersen.

Mr. Stichter: This doesn't take into consideration the possibility at all of what has actually happened, no verdict at all.

The Court: Exactly, there is no verdict.

Mr. Liebhafsky: With respect to Empire's request that entry of judgment be deferred, I would like to have some time to think about our position on that and whether or not to make a motion before your Honor under Rule 54B for immediate entry of judgment. I think there may be considerations on both sides of that as to whether or not judgment should be entered at this time, and I think it is a complicated matter that should be studied a little bit before we make a motion.

Mr. Marshall: Judge, I will be very brief for a change.

Given the jury's verdict, I think a judgment should be entered forthwith in favor of Mr. Meckler under Rule 54B. I doubt that plaintiffs would have any objection to that.

Mr. Liebhafsky: Excuse me. That one I want to take a look at, too. I don't know if you can do it for one defendant but not for the other in this situation. I just don't know.

Assuming there's no problem of that kind, then I would, of course, consent to it.

Mr. Marshall: I think Rule 54—

The Court: They all have to stand on their own feet. I don't think there's any problem with entering a judgment with respect to one defendant and not with respect to another.

Mr. Liebhafsky: Assuming that's the law, your Honor, we, of course, would have no problem with it.

Mr. Meyerson: Your Honor, I talked to my client last night and told him what was going on. Again he said if there was any possible way to get a verdict, to do it. This is the most disastrous. What it means, in effect, in a practical way, is that he's liable. It's either to give into a default judgment next time around or to appear pro se.

He couldn't even afford to appear pro se because he couldn't afford the time to be here except possibly for an opening, a closing and for his own testimony. So, in effect, by not reaching a verdict, it is a verdict of liability.

Since the verdict was in favor of Meckler and since Mr. Bonura—although it's shaped in the complaint in terms of aiding and abetting Black Watch, I think there's little doubt here that it either had to be aiding and abetting Meckler or aiding and abetting Dick. Most of the evidence against Bonura was aiding and abetting Meckler as head of Black Watch.

The only evidence that touched on Dick was Mr. Dunn's testimony with reference to the invoices, and further Mr. Dunn's testimony, number one, he said very clearly that

the invoices he typed were destroyed and that what he was asked to write on it, he doesn't remember what it was.

So that he couldn't say that what he was asked to write on the invoices were false invoices such as we had here. He couldn't even say that.

He said he had something to do with the blank invoice, but he didn't remember what it was. Whatever it was was destroyed. So it didn't have anything to do with this trial.

Moreover, my last question to him, he said possibly—his memory was cloudy and possibly it was not even Mr. Bonura who gave it to him. That was the only reference to aiding and abetting Mr. Dick.

As far as the reference to Dick—

The Court: Mr. Meyerson, I would like to say the trial is over. Referring to the testimony now is really outside of our business at the moment. You like anyone else have a right to make a motion for a directed verdict, renew your motion under the rule.

Mr. Meyerson: I will do that in writing, then, your Honor.

Mr. Liebhafsky: It just occurred to me, your Honor. I don't know whether there was anything further written down other than what the forelady said. I don't believe they complied with instructions in returning separate verdicts on the '68 and '69 transactions, the securities law versus common law, et cetera. I don't know whether we ought to take any action on that.

The Court: I don't think we should take any action on that. It is a unanimous verdict.

Mr. Liebhafsky: There may be questions in the future as to just what the verdict relates to.

Mr. Alcorn: I would say, your Honor, there will be questions in the future as to what the verdict relates to.

The Court: All right. See if the jury is still there.

(Pause.)

The Court: That's it then.

Mr. Marshall: Your Honor, it occurs to me that the jurors had nothing to say with respect to third party claims. I think it is obvious from your Honor's charge that if they found in favor of a particular defendant, then they must also find in favor of that defendant on any cross claims or third party claims.

I would, therefore, ask that your Honor direct a verdict in Mr. Meckler's favor with respect to all cross claims and third party claims although, frankly, I don't know that a direction from your Honor is necessary since I believe that a verdict in his favor obviously embodies within it a finding that he is not liable with respect to or to any other defendant for contribution.

The Court: I think that was said in my charge to the jury. From the standpoint of the plaintiff, if Meckler was not found liable, then Meckler could not be found liable to anyone else because the third party responsibility was predicated upon some action having been done which was detrimental to the plaintiff.

Mr. Marshall: Exactly. I only raise it out of an abundance of caution because your Honor had listed seven steps.

I see that the jury really came to the heart of the matter and then stopped. But I will ask that a judgment be entered with respect to both the cross claims and the third party claims.

The Court: I see no reason why that can't be done.

Mr. Marshall: Thank you, your Honor.

Mr. Alcorn: Your Honor, I just have one housekeeping matter. I'm not sure this was marked as a Court's Exhibit or that it was not. But you had a note from Mrs. Kennedy relating to her departure time. You came back in and straightened out the record as to when she was leaving. I would ask on behalf of Empire National Bank that that note be marked as a Court's Exhibit if it has not been done.

The Court: No problem.

Mr. Alcorn: Thank you.

The Court: Gentlemen, I would like to complement all of you. I am going to reserve on these motions. I think they should be submitted on papers for a complete record.

I want to complement you on your ability and your competency in the course of this long trial and also for your exhibition of temperament of the right kind.

With that I would bid you good day unless you have something else to say to me.

Mr. Marshall: I think all counsel will join with me, your Honor, when I thank you for making the last seven months very tolerable for all of us. We appreciate your kindness towards us.

The Court: All right.